UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM REIGEL,

Appellant

-vs-

No. 22459

SECURITIES and EXCHANGE COMMISSION,

Respondent.

APPELLANT'S REPLY BRIEF

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I

REPLY TO COMMISSION'S COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

It is not Reigel's purpose to argue the merits of espondent's counterstatement of issues presented for review, owever, it must be pointed out that the counterstatement does ot accurately reflect the issues presented for review. The espondent presents, as established an issue which in fact is n dispute and which will be argued before this Court. For xample, Respondent's issue No. 1 (Resp. Br. p. 1) reads as ollows:

> "Was there substantial evidence that a securities salesman wilfully violated Anti-fraud provisions of the Federal Securities Laws when the record shows that ....(B) He predicted a rapid, substantial price rise for those securities on the basis of negotiations between the issuer and others, when he had no reason to believe the negotiations would result in an agreement, or whether the agreement would be profitable for the issuer?" (Emphasis added.)

'here is evidence in the record to show that Reigel had a reasonble basis for his belief that an agreement was being reached.[1/] 'hether the evidence is sufficient is a question for this Court o decide, but the Respondent cannot avoid having this Court onsider that question by taking as given an issue which is ery much in dispute.

/ Duke Goldstone testified that the acquisition of the film ights was very probable and that negotiations were actually ompleted. (R. 497, 498, 499, 500). Colton testified that the alesmen were informed about the negotiations. He was not asked ow detailed the information he received was, he stated only that e did not tell them that the deal was closed. (R. 444, 445.)

A similar tactic is displayed by the Respondent when
: asks in Issue No. 3(a) whether "the order is subject to re-
iew because prior to the hearing the recollection of witnesses
gainst the Respondent had been refreshed by accurate memoranda
f their prior statements." (Emphasis added). There is no evi-
ence in the record which would indicate whether or not the
emoranda in question were or were not accurate. (See Reigel's
iscussion of this point on page 8 to 9, (infra).

II

REPLY TO COMMISSION'S ASSERTION THAT THE COMMISSION DID NOT DRAW AN ADVERSE INFERENCE FROM REIGEL'S FAILURE TO TESTIFY.

The Commission evidently believed that by stating in its
pinion that it was not relying on an adverse inference from
eigel's failure to testify (R. 2009), it neatly avoided any
othersome Constitutional issue. However, the Commission's as-
ertion that it based its findings on an independent review of
ne record does not stand up on close examination, because any
onsideration by the Commission of the Hearing Examiner's findings
fortiori also took into consideration all of the factors, including the inference that led the Hearing Examiner to make
is stated findings. Furthermore, findings of the Hearing
:aminer are necessarily a part of the record, and the Commission

must give due weight to them.[2] That those findings were greatly influenced by the improper inference is shown by the Hearing Examiner's evaluation of the testimony given by the only two witnesses offered by the Division to prove Reigel's alleged misrepresentation. In crediting that testimony the Hearing Examiner stated:

> "After having heard these witnesses and observing their demeanor the Hearing Examiner credits their testimony. Moreover, neither Cook, Pambrun, Fleischman nor Reigel testified at the hearing in their own behalf. Their failure to do so is deemed a factor of substantial significance, warranting the inference that their testimony would have been adverse." (R. 1691). (Emphasis added).

The Commission's argument is to the effect that it could disregard an inference which affected the Hearing Examiner's findings as to the credibility of the only two witnesses who testified against Reigel. But the Commission cannot know whether the testimony of those witnesses would have been credited but for the improper inference. The Commission certainly was not in a position to evaluate the credibility of these witnesses from the cold record. Although the Commission need not hear the witnesses testify, the Commission must at least give due weight to the findings of the one who did observe the demeanor of the witnesses.[3] But in the instant case,

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2/ Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 493 496, 497 (1951).

3/ Ibid.

to give due weight to those findings, would mean that the ommission had not disregarded the improper inference, but ad actually incorporated it into its own findings. Indeed, here is evidence in the Commission's Opinion itself that it id not disregard Reigel's failure to testify. The Commission sserts in its Opinion that:

> "Respondents have no knowledge of the terms of any agreement with Goldwyn, or the nature and quality of the film library, or of any of the other pertinent considerations making for the success or failure of such a venture." (R. 2004).

he Commission cites no evidence in the record for this con-lusion. Unless the Commission has inferred from the failure f Reigel and others to testify that they had no such informa-ion, it is difficult to see how the Commission reached this onclusion. The Commission certainly cannot contend that it oes not have the burden of proving its charges, but can shift o Reigel the burden of proving that he did not violate the law.

Strathmore Sec. Inc. v. S.E.C.[4/] cited by the Commis-ion for the proposition that it can properly disregard such n inference drawn by the Hearing Examiner is clearly distinguish-ble from the case at bar. In Strathmore Securities, Inc. v.

/ (Resp. Br. p. 23) C.C.H. Fed. Sec. L. Rep., Par. 92, 335 t 97,605 n. 2 (C.A. D.C., Jan. 24, 1969).

SEC, the Hearing Examiner "stated clearly that his findings did not need the support of the inference."[5] Therefore, in Strathmore, the Commission had not been presented with a record in which the findings with regard to the credibility of witnesses was incurably tainted by an unconstitutional inference. Nevertheless, the Court in Strathmore, citing Spevak v. Klein,[6] stressed the seriousness of the Constitutional question presented, but concluded that it was not necessary to decide the issue due to the fact that both the Hearing Examiner and the Commission stated that their findings did not rely on the inference.[7]

Contrary to the argument presented by the Commission (Resp. Br. p. 24) Colton clearly expressed the views of those individuals who did not wish to testify, including Reigel, (R.518). Whether or not the statement by Colton was completed is irrelevant.

The Commission argues that although Reigel was not represented by an attorney at the Hearing, he was represented prior to the reopening of the record for testimony by another Respondent, and that Reigel's attorney should have urged the Hearing Examiner to decide the reserved question so that he could determine whether Reigel should take the stand. (Resp.Br. p. 24-25).

5/ Ibid.

6/ Spevak v. Klein, 385 U.S. 511 (1967)

7/ C.C.H. Fed. Sec. L. Rep., Par. 92, 335 at 97,605 n.2.

ne Commission's argument in this regard is particularly con-
using since they cite a portion of the record which shows that
eigel's attorney did urge the Hearing Examiner to decide this
oint. (R. 610, 611). Furthermore, the Commission must be
ware that the re-opened hearing was expressly limited to the
urpose of hearing the testimony of Nees, and allowing Nees to
ross-examine the witnesses who testified against him. It should
e further noted that Reigel's attorney did request that the
roceedings be broadened to cover evidence introduced at the
rior hearing, and that the Hearing Examiner rejected this
equest. (R. 551-555).

III

REPLY TO COMMISSION'S ASSERTION THAT THE COMMISSION DID NOT RELY UPON HEARSAY EVIDENCE.

In order to refute Appellant's argument that the
ommission relied upon incompetent hearsay evidence in conclud-
ig that Reigel had no reasonable basis for representations made
by him, the Respondent now asserts that the Commission made no
findings with regard to whether there was actually a "deal"
between Jayark Films and Goldwyn. (Resp. Br. p. 25). Respondents
further argue that the finding that Reigel had no adequate basis
for his representations was based in part upon a conclusion that
"Respondents had no knowledge of the terms of any agreement with
Goldwyn, or the nature and quality of the film library, or of
any other pertinent considerations making for the success or

failure of such a venture'". (R. 2004). However, no evidence in the record to substantiate that conclusion is cited or in fact exists. None of the witnesses at the Hearing were asked if they had this information, and the Commission surely cannot be justified in drawing such a conclusion from the failure of Reigel to take the stand and testify as to his knowledge of the details of the negotiations.[8/] Indeed, the only explanation for such a conclusion on the part of the Commission is that, contrary to their protestations (R. 2009), the Commission did, in fact, draw an improper inference from Reigel's failure to testify.

After contending the Commission did not rely on the hearsay evidence contained in the Slaff letter, the Commission states that "in any event, technical rules of evidence do not apply in an Administrative Proceeding" (Resp. Br. p. 26). As the Respondents pointed out, Reigel has conceded that technical rules of evidence do not apply. However, surely the Respondent cannot contend that evidence should be admitted if it is not "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs."[9/]

_/ Spevak v. Klein, 385 U.S. 511 (1967).

/ Cal. Govt. Code, 11513(c).

As pointed out in Appellant's Opening Brief (p. 26-27) due o the obvious prejudice of Goldwyn's attorney, the author of he hearsay evidence in question, there is a serious question s to whether the evidence in question would even meet that equirement.

REPLY TO COMMISSION'S ASSERTION THAT THERE WAS NOTHING IMPROPER OR PREJUDICIAL IN REFRESHING THE RECOLLECTION OF INVESTOR-WITNESSES BY SHOWING THEM MEMORANDA OF PRIOR INTERVIEWS.

The Commission asserts that the memorandum of interviews hich were used to refresh the memory of witnesses were "highly ccurate" (Resp. Br. p. 26), and cites the statements of two itnesses who made that evaluation more than a year after the nterviews in question. (R. 290, 316). It should be noted that either of the witnesses who made the statements referred to ere part of the case against the Appellant herein, so that heir evaluations can have no relevance to the accuracy of he writings used to refresh the memory of witnesses who testied against Reigel. The Commission further states that espondents were aware of the refreshing techniques while the itnesses were on the stand (Resp. Br. p. 26); no citation to te record is offered for this proposition and the record itself early refutes this argument since all references in the Transcripts to this refreshing technique occur after the testimony

of the witnesses who testified against Reigel.[10/]

Furthermore, it is irrelevant that "no claim is made that the investigators did anything more than simply ask questions at the original interview." (Resp.Br.p.26). What Reigel is objecting to is the fact that the witnesses had their memories refreshed by memorandums prepared by the Division, not by the witnesses. The extent to which such memorandums were phrased by Mr. Hiller instead of by the witnesses could have been the difference between an alleged misrepresentation and an innocent representation. This point is buttressed by the fact that an investigator, such as Mr. Hiller, is inevitably going to include in such memorandums statements which tend to show violations of the law, and not statements which would tend to exculpate the alleged offender. Since Reigel was not represented by counsel he was not aware of his right to examine and cross-examine with respect to such writings. California law, at the time of the hearing, would not have allowed this refreshing technique. Code of Civil Procedure Section 2047 established

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10/ (R. 530, 531) Investigator Hiller testimony, (R. 299,360) testimony of two witnesses regarding accuracy of memorandums, R. 138-164) testimony of witnesses presented against Reigel.

Respondent cites page 365 of the Record for the proposition that an examination of one of the memoranda was permitted. However, page 365 makes no reference to such an occurrence.

the proper evidentiary standard to be applied at the time of the hearing.[11/]

REPLY TO COMMISSION'S ASSERTION THAT REIGEL'S ELECTION TO FOREGO COUNSEL AT THE INITIAL HEARING PROVIDES NO BASIS FOR ATTACK ON THE COMMISSION'S DECISION.

It is clearly irrelevant for the Commission to point out the "it is no fault of the Commission that Reigel chose not to be represented by counsel" or that "there is no requirement that counsel be provided" (Resp. Br. p. 28). Reigel has not contended otherwise. It is clearly relevant, however, in assessing the impact of the other procedural infirmities of the Hearing to take note of Reigel's lack of counsel. Interestingly enough, the Commission does not dispute that a lack of counsel would multiply the impact of other procedural irregularities, but merely asserts that there were no other procedural irregularities (Resp. Br. p. 28). Of course, that determination is for this court, and not for the Commission to make.

11/ "A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction at the time when the fact was fresh in his memory and he knew that the same was correctly stated in the writing." (Emphasis added) C.C.P. § 2047 (repealed).

The Commission argues blatantly contrary to the fact asserting that the attorney subsequently retained by Reigel as only recently decided that these infirmities exist". (Resp. . p. 28). The record clearly shows that Reigel's attorney raised ese issues before the Hearing Examiner upon his first opportunity do so, which was prior to the re-opened hearing, and prior to e Initial Decision; these issues were raised in the "Opposition Proposed Findings, Conclusions and Brief on Behalf of the vision of Trading and Markets, and Proposed Findings, Conclusions d Brief on Behalf of Respondents, William Reigel, Pierre Pambrun d Jay B. Cook" dated Dec. 20, 1965.[12/] Reigel's attorney again ised these issues at the re-opened hearing.[13/]

Even assuming that the Respondent is correct that the Hearing Examiner made it clear[14/] that he would not admit the

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/ PP. 66-67, introduction of incompetent hearsay evidence; . 70-72, improper education of witnesses; pp. 68-70, introction of irrelevant prejudicial evidence which induced Reigel t to testify; pp 62-63, opposition to Division's argument that ference of guilt should be drawn from failure to testify.

/ R. 611, 612, objected to education of witnesses; R. 610, quested ruling on introduction of irrelevant prejudicial evince, R. 560, objected to incompetent hearsay evidence; since e Hearing Examiner had not yet indicated that he had drawn improper inference, Reigel's attorney could not have raised e issue at the re-opened hearing.

/ The actual language used by the Hearing Examiner is somewhat biguous and would be particularly so to a layman. (R. 469-470).

vidence until he satisfied himself that it would be proper" Resp. Br. p. 29, n. 35), this would have no bearing on the dilemma faced by Reigel. The Hearing Examiner had stated that e thought the evidence was proper (R. 469-70), and Reigel could ertainly not read the mind of the Hearing Examiner and determine hat he would later change his mind and conclude that the evidence as inadmissible. The failure by the Hearing Examiner to rule hen and there that the Division's line of questioning was irrelevant placed Reigel in a position where if he testified it amounted o a gamble upon the Hearing Examiner's ultimate ruling upon the eserved point. This did not give Reigel a free choice in the atter and was highly prejudicial. (App. Op. Br. pp. 14-16)

VI.

REPLY TO COMMISSION'S ASSERTION THAT THE REMEDIAL ACTION TAKEN AGAINST REIGEL WAS WELL WITHIN THE COMMISSION'S DISCRETION.

The Respondent has not even attempted to reply to ppellant's argument that the Commission must apply reasonable tandards in determining the sanctions to be imposed upon alleged iolators of the Securities Laws. The Appellant has not disputed hat the Commission has power to alter the penalty imposed by he Hearing Examiner, so the cases cited for this proposition by he Commission are irrelevant. 15/

15/ (Respondent's Brief pp. 22, 30) Pierce v. Securities and Exchange Commission, 239 F. 2d 160 (C.A. 9, 1956); Resp. Br. p. 31; San Francisco Mining Exchange v. SEC, 378 F. 2d 162, (C.A.9, 1967).

The argument made by Reigel has been, and still is, hat the great disparity between the sanctions imposed by the earing Examiner and the sanctions imposed by the Commission in- icate either that the record failed to reflect accurately the enor of the testimony, due to the numerous procedural irregulari- ies, or that the Commission did not apply rational standards n determining the penalties which prohibited conduct calls for. urely the Commission cannot contend that they are not required o adhere to standards, but can arbitrarily and capriciously mete ut sanctions which can deprive individuals of the right to earn a livelihood in their chosen profession.

Reigel is not arguing that his penalty should be reduced ecause other individuals have received lighter penalties, so espondent's argument that it is irrelevant to compare remedies is tself irrelevant. (Resp. Br. p. 33). Reigel is arguing that the Com- ission, in deciding the remedies which an offense warrants, must pply reasonable standards. To avoid Reigel's position in this egard, the Commission has again offered the stale argument hat the provisions of the Exchange Act are not penal.[16/] It is ecoming more and more apparent that disciplinary proceedings ubjecting a person to license revocation demand the same con- titutional safeguards as would a criminal proceeding. Recent ases recognize that constitutionally objectionable procedures

6/ Resp. Br. p. 32.

annot be hidden under the cloak of "remedial measures for
ie public interest." 17/

VII.

REPLY TO RESPONDENT'S ASSERTION THAT REIGEL PARTICIPATED IN THE PUBLIC DISTRIBUTION OF UNREGISTERED JAYARK STOCK.

The Respondent admits that Reigel did not sell unregis-
ered securities (Resp. Br. p. 17). However, in an attempt to
rcumvent this admitted fact, it is argued that Reigel "aided
id abetted" in the sale of unregistered securities. (Resp. Br.
18). Respondent's argument in support of this belatedly asserted
roposition is incorrect for several reasons, (discussed infra),
ot the least of which was that Reigel was never charged with
iding and abetting in the sale of unregistered securities. The
rder for Proceedings does not charge that Reigel aided and
betted in the sale of unregistered securities. 18/ Neither the

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7/ Garrity v. New Jersey, 385 U.S. 493 (1967); Spevak v. Klein, 85 U.S. 511 (1967); Shively v. Stewart, 65 Cal.2d 475, 421 P.2d 65 (1966); Elder v. Bd of Medical Examiners, 241 CA 2d 246;) Cal. Rptr. 304 (1966)

8/ R. 128-132). The pertinent part of the Order for Proceeding as: "directly and indirectly, offered to sell, sold and delivered fter sale, certain securities ...." The word "indirectly" appears n the Act only with reference to the use of the mails and inter-tate commerce, and therefore could not be interpreted as pro-ibiting "aiding and abetting". Securities Act of 1933, §5(a) nd (c), 15 U.S.C. 77e (a) and (c).

earing Examiner in his Initial Decision, (R. 1667-1705), nor the mmission in its Opinion (R2000-2011) found that Reigel had aided d abetted in the sale of unregistered securities. Indeed, neither e Division nor the Commission has ever argued in their Briefs at Reigel aided and abetted in the sale of unregistered securi-es. In its "Proposed Findings, Conclusions and Brief" dated tober 7, 1965, the Division referred to Reigel as "activist in fecting the purchase for Registrant" (p. 7). However, Reigel s not charged with being an activist in effecting the purchase the unregistered shares, for the very simple reason that the atute which he was accused of violating prohibits the selling, fering to sell and delivery after sale of unregistered securities. curities Act of 1933 Sec. 5(a) and(c), 15 U.S.C. 77e (a) and (c). e Hearing Examiner avoided the problem altogether by discussing ly whether Reigel should have known that the shares should have en registered, and by never coming to grips with the question of ether Reigel in fact sold, offered to sell or delivered unregis-red shares (R. 1675).

The Commission in its Opinion skirted the issue by finding at Reigel "participated in the sale of unregistered securities." wever, Reigel was not charged and could not have been charged th "participating in the sale of unregistered securities", be-use the statute which he was accused of violating required that "sold", "offered to sell" or "delivered" unregistered securities. curities Act of 1933, §5(a) and (c), 15 USC 77e (a) to (c).

hus, both the "activist" label by the Division and the "partici-
ated" label of the Commission are words used to cloak a fatal
nission in the pleading -- to wit, that Reigel was not charged
ith "aiding and abetting".

It is important to note that the Commission, for the
irst time in these lengthy proceedings, has argued that Reigel
ided and abetted the sale of unregistered securities, completely
gnoring the fact that Reigel has never been so charged. It further
hould be noted by way of comparison that the Commission was
areful to allege in its original Order for Proceedings that
eigel aided and abetted violations of other Sections of the
ecurities Act, and the Exchange Act. (R. 1230, par. C, R. 1229,
ar. B). There are at least two possible explanations why Reigel
as not charged with aiding and abetting the violation of Section
(a) and (c) of the Securities act: Firstly, there was no statutory
uthority for a charge of aiding and abetting until 1964, as ad-
itted by the Division (Resp. Br. p. 18); the alleged violations
ook place prior to 1964. Secondly, the activities of Reigel
ould not be sufficient to constitute aiding and abetting.

The Respondent attempts to avoid the fact that at the
ime of the alleged offense, it was not prohibited by statute,
y rather cavalierly asserting that "it is not necessary to deter-
ine whether these provisions enacted in 1964 were intended to
ave a retroactive effect: (Resp. Br. p. 18). Respondent cites
or this proposition M.G. Davis & Co. v. Cohen, 256 F. Supp. 128
1966). An examination of the facts in M.G.Davis, supra, shows

learly that this case will not support a retroactive application the aiding and abetting provisions of Exchange Act Sec. 15 (b)(E), 15 U.S.C. 78o (b)(5)(E). The 1964 Amendment added several stinct provisions to the Exchange Act. One part of the Amendment ovided for bringing a suit directly against a salesman if he had mmitted an act which previously could have been the basis of a sciplinary proceeding against a broker or dealer who employed him. change Act of 1934 §15(b)(7), 15 U.S.C. 78o (b)(7). M. G. Davis, pra, dealt with this part of the amendment, and the court con-uded that in M.G. Davis there was no retroactive application the statute since the offense in question had been proscribed by rlier law, and the part of the amendment involved granted only a ocedural device to sue the employee directly.[19/] However, in the se at bar we are dealing with an offense which was not previously oscribed by statute, since the section which proscribed aiding d abetting was specifically added to the law by the 1964 amend-nt and prior to that time there was no statutory authority ich would have made such activity the basis of any disciplinary oceeding. Exchange Act Sec. 15 (b)(5)(E), 15 U.S.C.78o (b)(5)(E).

/ The court stated at pp 134-135:

> ". . . since 1936 the Commission has had authority to revoke or deny a broker-dealer registration on the basis of acts or omissions of a person associated with that broker-dealer. 15 U.S.C.§78o. After such a finding, the Commission is empowered to revoke the registration of any other broker-dealer who thereafter employed this person. . . . This effective, if cumbersome device for excluding wrong-doers from the securities field has simply been improved by the 1964 amendment authorizing the institution of disciplinary proceedings directly against salesmen.

Respondent goes on to argue that the Commission has long nterpreted the statute as proscribing aiding and abetting violations of the Securities Act. However, the cases cited by the espondent do not support that proposition. Many of the cases ited dealt with situations in which the owners of the firm were harged with "aiding and abetting" the violations of the firm.[20] t must be recognized that it is meaningless to contend that the wners and operators of a firm "aided and abetted" the violations f their firm; such a contention would be considered a tautology ere it not for the technical fiction that a firm is a separate ntity from its owners and operators. Other cases cited by the espondent[21] are cases which could more aptly be described as conpiracies, or joint ventures, and in some instances were so described,[22]

) /Resp. Br. p. 18; Batten and Co. v. SEC, 345 F. 2d 82 (C.A.D.C.1964) arnett v. United States, 319 F. 2d 340 (C.A. 8, 1963); Luckhurst nd Company, 40 SEC 539 (1961); William Todd, Inc. 32 SEC 537, (1951).

1/ Resp. Br.p. 18, Ross v. Licht, 263 F. Supp. 395, 410 (SDNY, 1967) alternative holding), Mason, Moran & Co., 35 SEC 85 (1953); rennan v. Midwestern United Life. Ins.Co.,259 F.Supp.673,682 .D.Ind.1966); Pettit v.American Stock Exch. 217 F.Supp.21,28 SDNY 1963); Scott Taylor & Co.,183 F.Supp. 904,909 n.12 (SDNY 1959) EC v. Timetrust,Inc.28 F.Supp.34, 43 (N.D.Cal. 1939); Burley & o., 23 SEC 461, 468, n. 11 (1946). Another case cited by the ommission refers to some very unclear dicta in a footnote and nerefore has not been discussed here, Henry P. Rosenfeld, 30 SEC 41, 944, n. 3 (1950).

2/ Scott Taylor & Co., 183 F. Supp. at 908; Pettit v. Amer. Stock xch., 217 F. Supp. at 28.

ince they dealt with fact situations in which the alleged iders and abetters were participating in the violations for heir own gain and there was evidence presented that they were ware of the unlawful purposes of the transactions.

None of the cases cited dealt with situations in which salesman has been accused of aiding and abetting the violation f his employer.[23/] This brings up the very serious question of hether the activity alleged against Reigel could be classified s aiding and abetting even if it were found that aiding and betting in the sale of unregistered securities was proscribed t the time of his actions. A very recent California case has efined aiding and abetting as to "instigate, encourage, promote r aid with guilty knowledge of the wrongful purpose of the per- etrator". People v. Flores, CA 2d Crim. 15501, Feb. 14, (1969). n the cases cited by the Commission where aiding and abetting of iolations of the Securities Laws were found these elements are bviously present. For instance, in Brennan, supra, a corpora- ion was found to have aided and abetted the violations of a roker-dealer and the Court stated:

> "Defendant knowingly and purposely encouraged an artificial build-up in the market for its stock. As a result of the stimulated market, the defendant was allegedly in a more favorable position for a potential merger which was then negotiating, and certain of the defendants' officers and directors realized substantial personal profits from the sale of the stock in the defendant corporation." 259 F.Supp. at 682.

3/ In Mason, Moran & Co, supra a manager was involved; there as evidence that he had full knowledge and actively participated n the fraudulent scheme.

The kind of involvement referred to in Brennan, supra, nd in the other cases cited by the Respondent are in sharp con- rast to the actions taken by Reigel herein. Reigel merely ar- anged for the purchase of shares by his employer pursuant to nstructions by his employer. There is no evidence in the record hich would indicate that Reigel had anything to gain by the con- ummation of the purchase by his employer, nor is there evidence hat Reigel had "guilty knowledge of the wrongful purpose" of his mployer.

Although the Respondent cites cases to indicate that it s not necessary that an individual know that his actions are nlawful to establish wilful violations, (Resp. Br. p. 19, n. 25) t should be noted that these cases do not deal with aiding and betting, but are cases in which the individual has performed he specific acts proscribed by the statute, so that the elements f the offense were in each case present; but in order to estab- ish the elements of aiding and abetting, it is necessary that he individual have "guilty knowledge of the wrongful purpose of he perpetrator".[24/] Here there is no evidence in the record hat Reigel had such guilty knowledge. There is evidence which ndicates that he believed that the stock in question was exempt rom registration.[25/] Since "guilty knowledge" is necessary in a

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24/ People v. Flores, CA 2d Crim. 15501, Feb. 14, 1969.

25/ Evidence was introduced which showed that appellant had been nformed in a letter from Kaufman that Kaufman's attorney had advised hat the shares would be exempt from SEC registration. Division's xhibit No. 3, letter dated Sept. 9, 1963 .

mmon law crime such as that considered in Flores, supra, orgery) it would seem axiomatic that such knowledge would be cessary in a technical statutory regulation, such as that in- lved in the instant case.

VIII

REPLY TO COMMISSION'S ASSERTION THAT REIGEL WILFULLY VIOLATED ANTI-FRAUD PROVISIONS IN THE SALE OF REGISTERED JAYARK STOCK.

The Respondent asserts that the predictions made by igel with respect to the future of Jayark stock had no reason- le basis since Reigel knew very little about the prospective deal ing negotiated between Jayark and Goldwyn (Resp. Br. p. 14, 15). wever, Respondent only points in the record to a statement made Colton that the salesmen were not told that the deal was osed. Of course the deal would not have been "closed" until e papers were actually signed. However, to contend that the ct that serious negotiations were in progress was not a relevant ctor in estimating the prospects of Jayark stock is far-fetched say the least. Indeed, it is arguable that it would be a each of duty on the part of Reigel to fail to report such a gnificant fact to his customers. The Commission points to no vidence in the record where it is stated that the only informa- on Reigel had with regard to the negotiations was that they re taking place. Unless the Commission is implying that Reigel d no other information, from Reigel's failure to take the stand d testify, it is difficult to see how the Commission reached s conclusion. Of course, the Commission has strenuously main-

ined that notwithstanding the improper inference drawn by the earing Examiner from Reigel's failure to testify (R. 1691), it mpletely excised that inference from the record in drawing its nclusions (R. 2009).

The Respondent cannot refute the admission by Mrs. B. cross-examination that the predictions made by Reigel were pressly made conditional on the acquisition of the film brary (R. 152); merely because in her prior testimony she had t indicated that those predictions had been conditioned. Mrs. B. s not asked whether Reigel's statements were conditional on rect examination. Of course, an important purpose of cross-amination is to clarify and explain testimony given on direct ich may be misleading. In this instance Mrs. B's cross-examination tly served that purpose.

The Respondent makes much of testimony in the record dicating that Reigel was not told whether the "deal was closed". esp. Br. pp. 14, 15.) However, it must be pointed out that ere is no evidence in the record that Mr. Reigel ever told his stomers that an agreement had been consummated. It is self-ident that until an agreement is consummated, one of the parties n always refuse to agree. All that a reasonable person can do to attempt to evaluate the possibilities of final consummation king place. Mr. Goldstone's testimony indicates that the pos-bilities were excellent. (R. 497, 498, 499, 500).

The Respondent argues the predictions of a substantial crease in the price of a speculative securities within a latively short period of time are inherently fraudulent and annot be justified. (Resp. Br. p. 16). However, as Reigel

ned that notwithstanding the improper inference drawn by the
ring Examiner from Reigel's failure to testify (R. 1691), it
pletely excised that inference from the record in drawing its
clusions (R. 2009).

The Respondent cannot refute the admission by Mrs. B.
cross-examination that the predictions made by Reigel were
ressly made conditional on the acquisition of the film
rary (R. 152); merely because in her prior testimony she had
indicated that those predictions had been conditioned. Mrs. B.
not asked whether Reigel's statements were conditional on
ect examination. Of course, an important purpose of cross-
mination is to clarify and explain testimony given on direct
ch may be misleading. In this instance Mrs. B's cross-examination
ly served that purpose.

The Respondent makes much of testimony in the record
icating that Reigel was not told whether the "deal was closed".
sp. Br. pp. 14, 15.) However, it must be pointed out that
re is no evidence in the record that Mr. Reigel ever told his
tomers that an agreement had been consummated. It is self-
dent that until an agreement is consummated, one of the parties
always refuse to agree. All that a reasonable person can do
to attempt to evaluate the possibilities of final consummation
ing place. Mr. Goldstone's testimony indicates that the pos-
ilities were excellent. (R. 497, 498, 499, 500).

The Respondent argues the predictions of a substantial
rease in the price of a speculative securities within a
atively short period of time are inherently fraudulent and
not be justified. (Resp. Br. p. 16). However, as Reigel

dicated in his Opening Brief (p. 46), all the cases cited by the spondent for this proposition were cases in which there was erwhelming independent evidence to support the unreasonableness the prediction, and, independent findings as to the unreasonable-ss of the predictions. Therefore the language in the cases cited mere dicta and even this dicta has not been repeated in a Fed-al Court case since all the citations offered were to Orders or leases of the Commission. As discussed more fully in Reigel's ening Brief (p. 47) the one Federal Court case which the Hearing-aminer cited for the same proposition actually upheld Reigel's sition that there can be a rational basis for such predictions.

TED: March 10, 1969.

Respectfully submitted,

Bernard I. Segal, Attorney for
Appellant Reigel

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM REIGEL, Appellant,	)	
-vs-	)	No. 22459
SECURITIES AND EXCHANGE COMMISSION, Respondent	)	

AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

ELSIE R. STIVERS, being first duly sworn, deposes and says that she is a secretary in the office of Bernard I. Segal, attorney at Law; that on March 11, 1969, she served the attached Appellant's Reply Brief on the persons named below, by placing a copy thereof in an envelope properly addressed to them at their address appearing under their names, which addresses are the last addresses of said persons known to her, and the envelope containing sufficient government postage was deposited by her in the United States mail at 5670 Wilshire Boulevard, Los Angeles California 90036, for delivery by the United States Post Office Department as directed by said envelope.

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DATED: March 11, 1969

Elsie R. Stivers
Elsie R. Stivers

Subscribed and sworn to before
me this 11 day of March, 1969.

Bernard I. Segal

BERNARD I. SEGAL
My Commission Expires Dec. 28, 1969